

Order

Michigan Supreme Court
Lansing, Michigan

March 29, 2023

Elizabeth T. Clement,
Chief Justice

162970

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 162970
COA: 352092
Wayne CC: 18-005065-FC

RAMI ALI JABER,
Defendant-Appellant.

On January 11, 2023, the Court heard oral argument on the application for leave to appeal the March 11, 2021 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals affirming the 15-point score assessed under Offense Variable (OV) 5 of the sentencing guidelines, VACATE the sentence of the Wayne Circuit Court, and REMAND this case to the trial court for resentencing. OV 5 should be scored at “15 points if the serious psychological injury to the victim’s family may require professional treatment.” MCL 777.35(2). In the context of a “serious psychological injury,” the word “serious” means “having important or dangerous possible consequences.” *People v Calloway*, 500 Mich 180, 186 (2017) (quotation marks and citation omitted). “[I]n scoring OV 5, a trial court should consider the severity of the injury and the consequences that flow from it, including how the injury has manifested itself before sentencing and is likely to do so in the future, and whether professional treatment has been sought or received.” *Id.* In the present case, although the victim’s father and brother “clearly experienced grief” from the victim’s death, “there was no evidence presented to show that [the victim’s family] experienced the type of serious psychological trauma contemplated in MCL 777.35.” *People v Bailey*, 330 Mich App 41, 62 (2019). The trial court’s primary justification for scoring OV 5 at 15 points was that “[t]his has to be psychologically damaging for this family.” But OV 5 may not be scored “solely on the basis of a trial court’s conclusion that a ‘serious psychological injury’ would normally occur as a result of” a given crime. *People v White*, 501 Mich 160, 162 (2017).¹

¹ *White* addressed the scoring of OV 4 (psychological injury to victim) under MCL 777.34. But as the Court of Appeals has noted, the relevant language in MCL 777.34 and MCL 777.35 is identical, other than that the former refers to “a victim,” while the latter refers to “a victim’s family.” See *People v Wellman*, 320 Mich App 603, 610-611 (2017). We agree with the Court of Appeals that the phrase “serious psychological injury” in MCL 777.34

And contrary to the Court of Appeals’ opinion, psychological injury cannot be inferred from the fact that the victim’s mother did not speak at sentencing, as the record is silent as to why she did not speak.² The evidence presented was insufficient to support the trial court’s decision to score OV 5 at 15 points. Because correcting the scoring of OV 5 would change the applicable guidelines range for the defendant’s minimum sentence, resentencing is required. See *People v Francisco*, 474 Mich 82, 89-91 (2006). We VACATE as moot Part VI of the Court of Appeals’ opinion.

We do not retain jurisdiction.

VIVIANO, J. (*concurring*).

I concur with the Court’s order in full, including the decision to vacate as moot Part VI of the Court of Appeals’ opinion. But because the issues in that part of its opinion are likely to arise again on remand, I believe it is worth noting the following legal principles to provide guidance to the trial court. First, when sentencing a defendant, a trial court should keep in mind that until a defendant is convicted, the Fourteenth Amendment’s Due Process Clause requires that the defendant be presumed innocent. *People v Beck*, 504 Mich 605, 614-615 (2019). Therefore, although there may be some exceptions, a court should generally avoid basing a finding of lack of remorse on a defendant’s testimony at trial. To fault a defendant for not expressing *at trial* a feeling that is predicated on a sense of guilt may be contrary to the presumption of innocence.

Second, when imposing a sentence, a trial court may not rely, even in part, on acquitted conduct. *Id.* at 609-610. “Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime.” *Id.* at 609.

Third, if the trial court imposes a sentence outside of the guidelines range, it must justify the extent of the departure. See *People v Steanhouse*, 500 Mich 453, 476 (2017) (explaining that a sentencing court “abuse[s] its discretion in applying the principle of proportionality by failing to provide adequate reasons for the extent of the departure sentence imposed”); *People v Smith*, 482 Mich 292, 305-306 (2008) (holding that a trial

and MCL 777.35 should be given the same meaning. See *id.*; see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 170 (“A word or phrase is presumed to bear the same meaning throughout a text . . .”). Therefore, we extend our analysis of OV 4 in *White* to OV 5.

² The trial court said to the victim’s mother, “I see your pain, and I understand that you are not able to speak today with regard to this issue.” While it is possible that the victim’s mother was unable to speak because of her pain, no evidence was submitted on this point.

court must give an “explanation for the *extent* of the departure independent of the reasons given to impose a departure sentence”).



t0322

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 29, 2023

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk